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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES DEE MCBRIDE,

Defendant and Appellant.

C061210

(Super.Ct.Nos. 072982  
& 082769)

Defendant James Dee McBride pled no contest to possessing methamphetamine in May 2007. (Case No. 072982.) A jury convicted defendant of inflicting corporal injury on a cohabitant in May 2008, and found that he personally inflicted great bodily injury during an act of domestic violence. (Case No. 082769.) The trial court found that defendant committed the corporal injury offense while released on bail or on his own recognizance, that he had a prior conviction for a serious felony within the meaning of the three strikes law, and that he had served a prior prison term. Defendant was sentenced to consecutive state prison terms totaling 13 years 8 months.

On appeal in both cases, which we have consolidated, defendant contends the trial court erred in failing to hold a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118 (hereafter *Marsden*)) in response to his request to file a motion for a new trial on the basis of ineffective assistance of counsel. He is also deemed to have raised a claim of entitlement to additional presentence conduct credits due to recent amendments to Penal Code section 4019. We shall affirm the judgment.

#### BACKGROUND

In light of the issue raised on appeal, the facts underlying the convictions are irrelevant. We need to summarize only the procedural background related to defendant's contention on appeal.

At the sentencing hearing, defendant's appointed trial attorney stated: "[Defendant] sent me a letter indicating he wishes a motion for a new trial to be made on his behalf, including an allegation of ineffective assistance of counsel, which clearly I'm in no position to make. So if that were to happen, other counsel should be appointed for [him], say the Public Defender, because I don't think there's a conflict with them in this case."

When a representative from the public defender's office appeared in the courtroom after a break in the proceedings, the trial court misstated defense counsel's remark. In the court's words: "A few moments ago [defense counsel] informed the Court that [*defendant*] *would like to have a new attorney*, file a motion for a new trial . . . ." (Italics added.) The court then said it was "prepared to appoint the Public Defender's Office for the sole purpose of evaluating whether or not a motion for a new trial is appropriate,

and if so, whether ineffective assistance of counsel would be raised as a ground." The public defender's office accepted the appointment.

At a subsequent appearance, the public defender's office told the court that the public defender declined to accept the appointment unless the court first held a *Marsden* hearing and determined there was a colorable showing of ineffective assistance of trial counsel. The court responded: "Well, I'm not going to schedule a *Marsden*. I don't feel this is a *Marsden* issue. This is a new trial issue, so it's not my intent to schedule a *Marsden* hearing. No request for a *Marsden* hearing has been made. The issue is simply the filing of a motion for new trial."

When the public defender's office persisted in its refusal to represent defendant, the court directed defendant's trial attorney to consider a motion for new trial "on whatever grounds you believe exist. [A]s to the ground that your client wishes to raise with regard to ineffective assistance of counsel[,] [a]pparently that cannot be or will not be raised in a motion for new trial and would have to be raised, if at all, on appeal." Defendant's trial attorney noted that he had not believed there were grounds for a new trial, but said that he would consult with defendant.

At the eventual sentencing hearing, an attorney appeared "especially" for trial counsel "to handle this case to its end." Special counsel said that he had consulted with trial counsel, who did not discern any basis for a motion for a new trial. He then raised defendant's claims of ineffective assistance: (1) appointed trial counsel did not adequately explore the "long-term history of violence between the parties, much of it

committed by the victim," a relationship about which "two witnesses, Barry and Colleen, he knows them only by their first names[s]" could have testified; (2) counsel "should have more aggressively pursued [defendant's] medical issues" because "his frailty was underestimated in the trial" and, if defendant had "appear[ed] during trial in a wheelchair," it would have shown he was unable to commit acts of violence on the victim; and (3) counsel did not properly handle the "picking of the jury." The court denied the motion.

#### DISCUSSION

##### I

Defendant's claim that the trial court erred in failing to hold a *Marsden* hearing is based upon the faulty premise that "[defendant] requested a new attorney, claiming that he received ineffective assistance of counsel . . . ."

Defendant simply expressed a desire to have his appointed attorney file a motion for a new trial based on an allegation that defendant had received ineffective assistance of counsel. It was trial counsel, not defendant, who raised the issue of the appointment of new counsel to explore claims of ineffective assistance at trial for purposes of a motion for a new trial.

While a defendant is not required to make a formal motion to substitute appointed counsel, there must be *some* indication that *substitution* is the desired remedy. (*People v. Dickey* (2005) 35 Cal.4th 884, 920 (hereafter *Dickey*).) Because defendant never suggested he wanted a substitution of appointed counsel based on ineffective representation at trial, this was not a situation such

as in *People v. Smith* (1993) 6 Cal.4th 684, and *People v. Diaz* (1992) 3 Cal.4th 495, requiring a trial court to hold a *Marsden* hearing to determine if new counsel is necessary to file a motion for a new trial. Expressions of only retrospective dissatisfaction with the adequacy of trial counsel's representation, without any indication of a desire for new representation thereafter, does not trigger the obligation to hold a *Marsden* hearing. (*Dickey, supra*, 35 Cal.4th at pp. 918-920 & fn. 12; *People v. Richardson* (2009) 171 Cal.App.4th 479, 485 (hereafter *Richardson*).)

Defendant cites *People v. Eastman* (2007) 146 Cal.App.4th 688 (hereafter *Eastman*), which held mere expressions of dissatisfaction with counsel trigger an obligation to hold a *Marsden* hearing, even absent an express request for substitution. However, in *Richardson*, this court found *Eastman* unpersuasive because it did not consider the reasoning of *Dickey*. (*Richardson, supra*, 171 Cal.App.4th at p. 485.) We adhere to the conclusion in *Richardson*.

In sum, defendant never expressed a desire to replace his appointed counsel. Thus, we reject his claim of *Marsden* error.<sup>1</sup>

## II

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without briefing) of whether amendments to Penal Code section 4019,

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<sup>1</sup> We fail to see how defendant was prejudiced by any failure to hold a *Marsden* hearing. He got a new attorney, who raised defendant's claim of ineffective counsel.

effective January 25, 2010, entitle him to additional presentence credits.

Those amendments do not apply to defendant because he was convicted of a violent or serious felony in that he personally inflicted great bodily injury on the victim. (Pen. Code, §§ 4019, subds. (b)(2) & (c)(2), 2933.1, 667.5, subd. (c)(8); 1192.7, subd. (c)(8).)

DISPOSITION

The judgment is affirmed.

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SCOTLAND, P. J.

We concur:

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SIMS, J.

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BUTZ, J.